Sunrise Sdn Bhd v First Profile (M) Sdn Bhd & Anor

FEDERAL COURT (KUALA LUMPUR) — CIVIL APPEAL NO 02–511–93
CHONG SIEW FAI CJ (SABAH & SARAWAK), MOHD DZAIDDIN AND PEH SWEE CHIN FCJJ
10 MAY 1996

Civil Procedure *— Injunction — Interlocutory injunction — Application for interlocutory injunction to restrain holding company from disposing of lands registered in the name of subsidiary — Subsidiary wholly-owned, controlled and managed by holding company — Whether interlocutory injunction could be issued against holding company in respect of properties owned by its subsidiary — Whether there was serious question to be tried — Whether balance of convenience was in favour of maintaining the status quo of situation until trial of action*

Companies and Corporations *— Separate legal entity — Holding and subsidiary companies — Directors of subsidiary were nominees of holding company — Subsidiary wholly-owned, controlled and managed by holding company — Whether court should disregard the notional separateness of the companies*

Companies and Corporations *— Separate legal entity — Lifting the veil of incorporation — Holding and subsidiary companies — Directors of subsidiary were nominees of holding company — Subsidiary wholly-owned, controlled and managed by holding company — No dispute about composition, shareholding and control of subsidiary — Whether necessary to invoke doctrine of 'lifting the corporate veil'*

The second respondent company, Saga Prestige Sdn Bhd was a wholly-owned subsidiary ('the subsidiary') of the first respondent company, First Profile (M) Sdn Bhd ('the holding company'). All the directors of the subsidiary were nominees of the holding company. By an agreement dated 16 October 1991 ('the agreement'), the holding company agreed to sell to the appellant all the paid-up shares of the subsidiary for RM6,193,000. A sum of RM100 was paid as deposit and part payment of the purchase price. The appellant alleged that although the agreement was for the sale and purchase of shares, it was in fact an acquisition of four pieces of land ('the lands') owned by the subsidiary, which were expressly spelt out and particularized in the agreement. It was provided in the agreement that the holding company intended to build schools on the lands and was to submit an application to Dewan Bandaraya Kuala Lumpur for a development order within three months from the date of the agreement. It was further provided that the agreement was conditional upon the development order not being obtained by the holding company within 15 months from the date of its application, ie on or before 16 April 1993. It seemed that the holding company did not manage to obtain the development order by 16 April 1993. This meant that the conditional agreement had become unconditional. However, it appeared that on 13 April 1993, ie three days before the cut-off date, the holding company returned the deposit and part payment to the appellant and purported to terminate the agreement. The appellant

filed an action on 30 June 1993 claiming, inter alia: (i) a declaration that the holding company had committed anticipatory breach of the agreement; (ii) specific performance; and (iii) an injunction restraining the holding company from disposing of the shares of the subsidiary. The appellant had also applied for an interlocutory injunction to restrain the holding company from disposing of or otherwise dealing in any manner whatsoever with any of the lands registered in the name of the subsidiary. The trial judge refused the appellant's application for interlocutory injunction with costs, on the grounds that: (i) the holding company, being shareholder of the subsidiary, had no right to dispose of or deal with the lands of the latter; (ii) the injunction, even if granted, would not prevent the subsidiary from selling off the lands; and (iii) the appellant's fear that the holding company, through its directors or otherwise, would dispose of the lands to some third party was unfounded, as there was no evidence to show that the subsidiary intended to pass any resolution to deal with the lands. The appellant appealed. The main issues before the court were: (i) whether on the uncontroverted evidence, interlocutory injunction could be issued against the holding company in respect of properties owned by its subsidiary; and (ii) whether it was necessary for the appellant to invoke the doctrine of lifting the corporate veil of the subsidiary in this case.

Held, allowing the appeal:

(1) By holding that the holding company had no right to dispose of or deal with the lands, the trial judge failed to appreciate the unchallenged evidence of the appellant that the directors of the subsidiary were the nominees of the holding company, and that the holding company wholly owned and was in control of the subsidiary (see p 541C).

(2) The trial judge's considerations that the injunction, even if granted, would not prevent the subsidiary from disposing of the lands, and the lack of evidence indicating the intention of the subsidiary to pass resolution disposing of the lands, were irrelevant bearing in mind that the interlocutory injunctive relief sought was against the holding company (see p 541D).

(3) The sole question was whether the appellant had made out a case warranting the grant of the relief against the holding company, which, on the evidence, the court found it had (see p 541D–E).

(4) The material averments contained in the appellant's affidavits filed in support of the application were never answered and hence must be taken to have been admitted (see p 541G–H); *Alloy Automotive Sdn Bhd v Perusahaan Ironfield Sdn Bhd* [1986]

A 1 MLJ 382, *Ng Hee Thoong & Anor v Public Bank Bhd* [1995]1 MLJ 281 and *Overseas Investment Pte Ltd v Anthony William O'Brien* followed.

(5) For all intents and purposes, the subsidiary was not only wholly-owned by the holding company, but was also controlled B and managed by the holding company. Resolution to dispose of the landss, if any, would have been the doing of the holding company. However, the holding company did not provide any statement to dispel such fear or to suggest that this would not occur. On the other hand, the holding company had purportedly terminated the agreement prematurely, and returned the deposit C and part payment. On the unchallenged evidence adduced by the appellant, the court considered that the appellant's fear was not without some basis (see p 542B–D).

(6) From the balance sheet of the subsidiary and the valuation report, it did appear that the lands were the most valuable D assets of the subsidiary. Therefore, there were merits in the assertions of the appellant that though the agreement was for the sale and purchase of all the shares of the subsidiary, it was in fact for the acquisition of the lands (see p 542E–F).

(7) It was not necessary to invoke the doctrine of 'lifting the E corporate veil' in the particular facts and circumstances of the present case. It was an undisputed fact that the subsidiary was wholly-owned by the holding company, and it had not been challenged that the holding company, by proxy — through its nominees — managed the subsidiary. Thus, the composition, type, shareholding and control of the subsidiary stood in front F of the veil, and there was no need to lift the veil to unveil them (see pp 542G–I and 543A).

(8) In cases where there are signs of separate personalities of companies being used to enable persons to evade their contractual obligations or duties, the court would disregard G the notional separateness of the companies (see p 543E); *Gilford Motor Co Ltd v Horne* [1933] Ch 935, *Jones & Anor v Lipman & Anor* [1962] 1 All ER 442 and *Elliott & Anor v Pierson* [1948] 1 All ER 939 followed.

(9) On the authorities, it was clearly permissible in law to grant an H interlocutory injunction restraining the actual controller and manager behind a company (as opposed to the company itself) from evading the contractual obligations or duties undertaken by the company. The fact that the company under control has not been restrained is, in itself, not a necessary bar from granting the relief against the controller and manager behind it I (see p 545F).

(10) In the light of all the evidence and circumstances, the court was of the view that there existed serious questions to be tried and that the balance of convenience lay in favour of maintaining the status quo of the situation until the trial of the action (see p 545H–I); *American Cyanamid Co v Ethicon Ltd* [1975] AC 396 followed.

[Bahasa Malaysia summary

Syarikat penentang kedua, Saga Prestige Sdn Bhd merupakan sebuah subsidiari ('subsidiari tersebut') yang dimiliki sepenuhnya oleh syarikat penentang pertama, First Profile (M) Sdn Bhd ('syarikat induk'). Kesemua pengarah subsidiari tersebut adalah penerima namaan syarikat induk. Melalui suatu perjanjian bertarikh 16 Oktober 1991 ('perjanjian tersebut'), syarikat induk bersetuju untuk menjual kepada perayu semua syer berbayar dalam subsidiari tersebut pada harga RM6,193,000. Jumlah sebanyak RM100 telah dibayar sebagai deposit dan sebahagian daripada bayaran harga belian. Perayu mengatakan bahawa walaupun perjanjian tersebut adalah untuk jualan dan belian syer, pada hakikatnya ia merupakan pengambilan empat bidang tanah ('tanah tersebut') yang dimiliki oleh subsidiari tersebut, yang telah dinyatakan dengan jelas dan diperincikan dalam perjanjian tersebut. Ia diperuntukkan dalam perjanjian tersebut bahawa syarikat induk berhasrat mendirikan sekolah atas tanah tersebut dan harus mengemukakan suatu permohonan kepada Dewan Bandaraya Kuala Lumpur untuk perintah pemajuan dalam tempoh tiga bulan daripada tarikh perjanjian tersebut. Ia selanjutnya diperuntukkan bahawa perjanjian tersebut adalah bersyarat jika perintah pemajuan tidak diperolehi oleh syarikat induk dalam tempoh 15 bulan daripada tarikh permohonannya, iaitu pada atau sebelum 16 April 1993. Secara kebetulan, syarikat induk tidak berjaya mendapatkan perintah pemajuan pada 16 April 1993. Ini bermakna bahawa perjanjian bersyarat telah menjadi tanpa syarat. Namun demikian, pada 13 April 1993, iaitu tiga hari sebelum tarikh pemotongan, syarikat induk telah mengembalikan deposit dan sebahagian bayaran kepada perayu dan bermaksud untuk menamatkan perjanjian tersebut. Perayu memfailkan suatu tindakan pada 30 Jun 1993 menuntut, antara lain: (i) suatu deklarasi bahawa syarikat induk telah melakukan kemungkiran perjanjian dalam jangkaan; (ii) pelaksanaan spesifik; dan (iii) suatu injunksi menahan syarikat induk daripada melupuskan syer subsidiari tersebut. Perayu juga telah memohon suatu injunksi interlokutori untuk menahan syarikat induk daripada melupuskan atau berurusan dalam apa cara sekalipun dengan mana-mana tanah yang didaftarkan atas nama subsidiari tersebut. Hakim perbicaraan menolak permohonan perayu untuk injunksi interlokutori dengan kos, atas alasan bahawa: (i) syarikat induk, yang merupakan pemegang

A syer subsidiari tersebut, tidak mempunyai hak untuk melupuskan atau berurusan dengan tanah kepunyaan subsidiari tersebut; (ii) injunksi tersebut, jika pun diberikan, tidak akan menghalang subsidiari tersebut daripada menjual tanah tersebut; dan (iii) kekhuatiran perayu bahawa syarikat induk, melalui pengarah atau sebaliknya, akan melupuskan tanah tersebut kepada pihak ketiga tidak berasas, oleh B kerana tiada bukti yang menunjukkan bahawa subsidiari tersebut berhasrat meluluskan apa-apa resolusi untuk berurusan dengan tanah tersebut. Perayu membuat rayuan. Isu-isu utama yang perlu dipertimbangkan oleh mahkamah adalah: (i) sama ada atas keterangan yang tidak dipertikaikan, injunksi interlokutori boleh dikeluarkan C terhadap syarikat induk berhubung dengan harta yang dimiliki oleh subsidiarinya; dan (ii) sama ada ianya adalah perlu untuk perayu menggunakan doktrin mengangkat selubung perbadanan ke atas subsidiari tersebut dalam kes ini.

D **Diputuskan**, membenarkan rayuan:

(1) Dengan memutuskan bahawa syarikat induk tidak mempunyai hak untuk melupuskan atau berurusan dengan tanah tersebut, hakim perbicaraan telah gagal mengambil kira keterangan perayu yang tidak dicabar bahawa pengarah-pengarah subsidiari tersebut adalah penerima namaan syarikat induk, dan bahawa E syarikat induk adalah pemunya sepenuh dan mengawal subsidiari tersebut (lihat ms 541C).

(2) Pertimbangan hakim perbicaraan bahawa injunksi itu, jika pun diberikan, tidak akan menghalang subsidiari tersebut daripada melupuskan tanah tersebut, dan kekurangan bukti yang F menunjukkan hasrat subsidiari tersebut untuk meluluskan resolusi melupuskan tanah tersebut, adalah tidak relevan sambil mengingati bahawa relief injunksi interlokutori yang diminta adalah terhadap syarikat induk (lihat ms 541D).

(3) Persoalan tunggal adalah sama ada perayu telah mewujudkan suatu kes yang membenarkan pemberian relief tersebut terhadap G syarikat induk, yang mana, atas keterangan, mahkamah mendapati perayu telah mewujudkan satu kes (lihat ms 541D–E).

(4) Penegasan material yang terkandung dalam afidavit-afidavit perayu yang difailkan menyokong permohonan tidak pernah H dijawab dan oleh itu mesti dianggap sebagai telah diakui (lihat ms 541G–H); *Alloy Automotive Sdn Bhd v Perusahaan Ironfield Sdn Bhd* [1986] 1 MLJ 382, *Ng Hee Thoong & Anor v Public Bank Bhd* [1995]1 MLJ 281 dan *Overseas Investment Pte Ltd v Anthony William O'Brien* diikut.

I (5) Untuk semua niat dan tujuan, subsidiari tersebut bukan sahaja dimiliki sepenuhnya oleh syarikat induk, tetapi juga dikawal

dan diuruskan oleh syarikat induk. Resolusi untuk melupuskan tanah tersebut, jika ada, adalah perbuatan syarikat induk. Walau bagaimanapun, syarikat induk tidak memberi apa-apa kenyataan untuk menghilangkan kekhuatiran tersebut atau untuk menyatakan bahawa ini tidak akan berlaku. Sebaliknya, syarikat induk telah bermaksud untuk menamatkan perjanjian tersebut secara pramasa, dan mengembalikan deposit dan bayaran sebahagian. Atas keterangan yang dikemukakan oleh perayu yang tidak dicabar, mahkamah berpendapat bahawa kekhuatiran perayu bukannya tanpa sebarang asas (lihat ms 542B–D).

(6) Daripada kunci kira-kira subsidiari tersebut dan laporan penilaian, adalah didapati bahawa tanah tersebut adalah aset-aset subsidiari tersebut yang paling berharga. Oleh itu, terdapat merit dalam penegasan perayu bahawa walaupun perjanjian tersebut adalah untuk perjanjian jual beli semua syer subsidiari tersebut, ia sebenarnya adalah untuk pengambilan tanah tersebut (lihat ms 542E–F).

(7) Doktrin 'mengangkat selubung perbadanan' tidak perlu digunakan dalam fakta dan keadaan tertentu kes ini. Adalah satu fakta yang tidak dipertikaikan bahawa subsidiari tersebut dimiliki sepenuhnya oleh syarikat induk, dan ia tidak dicabar bahawa syarikat induk, dengan proksi — melalui penerima namaannya — menguruskan subsidiari tersebut. Oleh itu, komposisi, jenis, pemegangan syer dan kawalan subsidiari tersebut terdapat di hadapan selubung, dan tiadanya keperluan untuk mengangkat selubung itu untuk memperlihatkannya (lihat ms 542G–I dan 543A).

(8) Dalam kes-kes di mana terdapat tanda-tanda personaliti syarikat berasingan yang digunakan untuk membolehkan seseorang mengelakkan obligasi atau kewajipan kontraktual, mahkamah akan mengabaikan tanggapan pengasingan syarikat (lihat ms 543E); *Gilford Motor Co Ltd v Horne* [1933] Ch 935, *Jones & Anor v Lipman & Anor* [1962] 1 All ER 442 dan *Elliott & Anor v Pierson* [1948] 1 All ER 939 diikut.

(9) Berdasarkan autoriti, adalah jelas dibenarkan dalam undang-undang untuk memberikan injunksi interlokutori menahan pengawal dan pengurus sebenar di sebalik sesebuah syarikat (bertentangan dengan syarikat itu sendiri) daripada mengelakkan obligasi atau tanggungjawab kontraktual yang diakujanji oleh syarikat itu. Fakta bahawa syarikat di bawah kawalan tidak ditahan tidak dengan sendirinya menjadi penghalang kepada pemberian relief terhadap pengawal dan pengurus di sebaliknya (lihat ms 545F).

(10) Berdasarkan keterangan dan keadaan, mahkamah berpendapat bahawa terdapat persoalan yang serius untuk dibicarakan dan

imbangan kemudahan memihak kepada pengekalan status quo keadaan itu sehingga perbicaraan tindakan (lihat ms 545H–I); *American Cyanamid Co v Ethicon Ltd* [1975] AC 396 diikut.]

Notes

For cases on interlocutory injunction, see *2 Mallal's Digest* (4th Ed, 1994 Reissue) paras 1564–1611.

For cases on separate legal entity, see 3 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 278–301.

Cases referred to

Alloy Automotive Sdn Bhd v Perusahaan Ironfield Sdn Bhd [1986] 1 MLJ 382

American Cyanamid Co v Ethicon Ltd [1975] AC 396

Aron Salomon v A Salomon & Co Ltd [1897] AC 22

Elliott & Anor v Pierson [1948] 1 All ER 939

Gilford Motor Co Ltd v Horne [1933] Ch 935

Hadley v London Bank of Scotland Ltd (1865) 46 ER 562

Jones & Anor v Lipman & Anor [1962] 1 All ER 442

Ng Hee Thoong & Anor v Public Bank Bhd [1995]1 MLJ 281

Overseas Investment Pte Ltd v Anthony William O'Brien & Anor [1988] 3 MLJ 332

Preston v Luck (1884) 27 Ch D 497

The Gramophone and Typewriter Ltd v Stanley [1908] 2 KB 89

Appeal from: Suit No D2-22-692-1993 (High Court, Kuala Lumpur)

PS Gill (*Shook Lin & Bok*) for the appellant.
Pushpa Menon (*Adnan Sundra & Low*) for the respondents.

Cur Adv Vult

Chong Siew Fai CJ (Sabah & Sarawak) (delivering the judgment of the court): At the conclusion of the hearing, we allowed the appeal of the appellant with costs here and below, and granted, subject to the usual undertaking as to damages, an injunction restraining the first respondent company, First Profile (M) Sdn Bhd ('the holding company') through its directors, officers, servants, agents or otherwise howsoever from disposing of or otherwise dealing in any manner whatsoever any of the four parcels of lands described below until judgment in the action or until further order. We now give our reasons.

The second respondent company, Saga Prestige Sdn Bhd ('the subsidiary'), was a wholly-owned subsidiary of the holding company and

had a paid-up capital of RM2,720,016 made up of 2,720,016 shares of RM1 each. The subsidiary owned four pieces of land ('the lands') held under GM 108 Lot 1881, GM 109 Lot 1882, GM 110 Lot 1891 and GM 111 Lot 1892, all in Mukim Batu, Wilayah Persekutuan.

By an agreement dated 16 October 1991 ('the agreement') made between the appellant and the holding company, the holding company agreed to sell to the appellant all the paid-up shares of the subsidiary for RM6,193,000. A sum RM100 was paid as deposit and part payment of the purchase price.

Section 1.04 of the agreement stated that the holding company intended to build schools on the lands and towards that end was to submit an application to Dewan Bandaraya Kuala Lumpur for a development order for the building, construction and erection of the schools within three months from 16 October 1991, ie the date of the agreement. The three-month period would be up to 16 January 1992 and there is uncontroverted evidence that the application was submitted on 16 January 1992.

The parties to the agreement further agreed under s 4.01 thereof that the agreement is conditional upon the development order not being obtained within 15 months from the date of its application (16 January 1992). The 15 months would be up to 16 April 1993 ('the cut-off date'). There is unchallenged evidence that no development order was obtained by 16 April 1993. This meant that the conditional agreement had become unconditional.

However, on 13 April 1993, ie three days before the cut-off date, the holding company, by a letter of the same date, returned the deposit and part payment to the appellant and purported to terminate the agreement, but putting it in a rather round about way stating: 'We hereby write to inform you that we herewith release you from the aforesaid obligation.'

Dissatisfied with the turn of events, the appellant filed an action on 30 June 1993 claiming, inter alia: (i) a declaration that the holding company had committed anticipatory breach of the agreement; (ii) specific performance; and (iii) an injunction restraining the holding company from disposing of the shares of the subsidiary.

The appellant also applied for an interlocutory injunction to restrain the holding company from disposing of or otherwise dealing in any manner whatsoever with any of the lands registered in the name of the subsidiary. The application was supported by three affidavits while the holding company did not file any.

It should, perhaps, be pointed out that initially the appellant brought the action against the holding company only. The application for interlocutory injunction was also directed only against the holding company. Subsequently, the appellant had the subsidiary added as the second

A defendant to the action but without amending the prayer for the interlocutory injunction to include or restrain the subsidiary.

The learned trial judge refused the appellant's application for interlocutory injunction with costs, holding that the holding company, being shareholder of the subsidiary, had no right to dispose of or deal with B the lands of the latter; that the injunction, even if granted, would 'not prevent the subsidiary from selling off the lands and that there was no evidence showing that the subsidiary intended to pass any resolution to deal with the lands. The appellant appealed.

With respect, to hold that the holding company had no right to C dispose of or deal with the lands, the learned judge failed to appreciate the unchallenged evidence of the appellant that the directors of the subsidiary were the nominees of the holding company and that the holding company wholly owned and was in control of the subsidiary. As regards the reasonings that the injunction, even if granted, would not prevent the subsidiary from disposing of the lands, and the lack of evidence indicating the intention of D the subsidiary to pass resolution disposing of the lands, we do not think the consideration is relevant bearing in mind that the interlocutory injunctive relief sought is against the holding company. The sole question is whether the appellant had made out a case warranting the grant of the relief against the holding company, which, on the evidence, we think it had. Arguably, it might well have been prudent that the subsidiary be similarly enjoined E after its being made a co-defendant to the action, but failure to do so is, in itself, no reason for denying the relief against the holding company when the evidence justifies the grant.

The Appeal

F The memorandum of appeal contained seven grounds of appeal which could be conveniently condensed into a single issue: On the uncontroverted evidence, could the interlocutory injunction be issued against the holding company in respect of properties owned by its subsidiary?

Before us, Mr PS Gill for the appellant contended — and, in our G opinion, rightly on the facts and circumstances of this case — that the material averments contained in the appellant's affidavits filed in support of the application were never answered and hence must be taken to have been admitted. (See *Alloy Automotive Sdn Bhd v Perusahaan Ironfield Sdn Bhd* [1986] 1 MLJ 382 at p 385, citing *Dawkins v Prince Edward of Saxe* H *Weimar* (1875–76)1 QBD 499; *Ng Hee Thoong & Anor v Public Bank Bhd* [1995]1 MLJ 281; and *Overseas Investment Pte Ltd v Anthony William O'Brien & Anor* [1988] 3 MLJ 332). Hence, it was not disputed that the holding company, purporting to terminate the agreement, had returned the deposit and part payment of RM100 before the cut-off date. Nor was it disputed that the subsidiary was wholly-owned by the holding company, I

the latter having acquired all the shares in the former pursuant to an earlier agreement dated 15 October 1991 entered into between the holding company and the previous shareholders of the subsidiary. There was also the uncontroverted evidence that after the acquisition, all the then directors of the subsidiary had resigned and were replaced by the nominees of the holding company. Thus, for all intents and purposes, the subsidiary was not only wholly-owned by the holding company, but was also controlled and managed by the holding company. The learned trial judge described as unfounded the appellant's fear that the holding company, through its directors, officers, agents or otherwise, would dispose of the said lands to some third party on the ground that there was no evidence that the board intended to pass any resolution relating to any dealing over the lands. Admittedly, there was no clear evidence to that effect. However, such resolution, if any, would have been the doing of the holding company. Yet, there was not a word from the holding company to dispel such fear or even to suggest that this would not occur. On the other hand, the holding company had purportedly terminated the agreement prematurely, and returned the deposit and part payment. There was also uncontradicted evidence that the holding company controlled and managed the subsidiary fully owned by it. On the unchallenged evidence adduced by the appellant, we considered that the appellant's fear was not without some basis.

The balance sheet of the subsidiary as at 31 July 1991 clearly indicated that fixed assets notably constituted highly substantial part of the assets of the company. The valuation report of the registered valuer (exh TKC-9 annexed to Tan Kim Chuan's affidavit affirmed on 20 August 1993) showed that in August 1993, the lands — with vacant possession and free from incumbrances — had an open market value of RM11,054,000. It does appear that the immovable assets are the proverbial geese that lay the golden eggs for the subsidiary. In our view, there are merits in the assertion on behalf of the appellant that though the agreement was for the sale and purchase of all the shares of the subsidiary, it was in fact for the acquisition of the lands which were expressly spelt out and particularized in the agreement.

In the course of arguments, the question of 'lifting the corporate veil' which was widely canvassed in the court below was again raised. With respect, we did not see the necessity of invoking the doctrine in the particular facts and circumstances of the present case. Peeping behind the veil is to enable the court to obtain information on certain features of the company, for example, its composition, type (holding, subsidiary etc), proportion of shareholdings, control etc. Having obtained this information, the court will examine it and then decide whether to adjudicate on the company alone or to move up the ladder of lifting the veil, to more serious repercussions. In our instant case, it was an undisputed fact that the subsidiary was wholly-owned by the holding company, and it had not been challenged that the holding company, by proxy — through its nominees —

managed the subsidiary. Thus, the composition, type, shareholding and control of the subsidiary stood in front of the veil, and there was no need to lift the veil to unveil them.

Puan Pushpa Menon, for the holding company, contended that there was no real necessity to answer the averment of the appellant since the objection to the application was based purely on a question of law, ie the propriety of granting the injunctive relief against the holding company when the registered owner of the land was the subsidiary, which was a separate entity. In support, she cited Ford's *Principles of Corporations Law* (6th Ed, 1992) p 158 para 706; Pennington's *Company Law* (5th Ed, 1988) p 52 para 1; and *The Gramophone and Typewriter Ltd v Stanley* [1908] 2 KB 89 at pp 95 and 99.

We are in complete agreement with the basic principle of the fundamental attribute of corporate personality, ie that the corporation is a legal entity distinct from its members, be they individuals or corporate bodies — a principle firmly established since *Aron Salomon v A Salomon & Co Ltd* [1897] AC 22. However, since then, the development of the law has seen numerous deviations from the strict rule of the separate legal entity of the company through cases where the courts, on the particular facts and circumstances of those cases, found it appropriate and necessary to depart. Thus, in cases where there are signs of separate personalities of companies being used to enable persons to evade their contractual obligations or duties, the court would disregard the notional separateness of the companies. In *Gilford Motor Co Ltd v Horne* [1933] Ch 935, Horne was formerly the managing director of the plaintiff company, Gilford Motor Co Ltd. He covenanted not to solicit customers of the plaintiff company within five years from the determination of his employment. However, soon after leaving the plaintiff's employment, he set up JM Horne & Co Ltd for the sale of spare parts of Gilford vehicles and through which he solicited the plaintiff company's customers. On appeal, the court held that Horne had breached his covenant and granted an injunction against both Horne and his company. In granting the injunction against Horne, Lawrence LJ said (at p 965):

> In these circumstances, I agree with the finding by the learned judge that the defendant company was a mere channel used by the defendant Horne for the purpose of enabling him, for his own benefit, to obtain the advantage of the customers of the plaintiff company, and that therefore the defendant company ought to be restrained *as well as the defendant Horne*. (Emphasis added.)

In his speech, Lawrence LJ described the defendant company JM Horne & Co, which was formed after the defendant Horne had left the plaintiff company, as 'mere cloak or sham' and 'mere channel' used by Horne, whereas in our instant case, the set up was one of holding and wholly-owned subsidiary companies, and a crucial factor was the question of

control or management of the latter. Be that as it may, the distinction did not affect the application of the well established principles governing the grant of interlocutory injunctions. A

In *Jones & Anor v Lipman & Anor* [1962] 1 All ER 442, the first defendant ('the vendor') agreed to sell freehold land to the plaintiff ('the purchaser'). To avoid completion of the sale to the purchaser, the vendor B sold and transferred the land to the second defendant company — Alamed Ltd — of which the vendor and a clerk of his solicitors were the directors and shareholders, and the company was under the complete control of the vendor. The purchaser sought an order of specific performance. In ordering specific performance of the contract against the vendor and the company, C Russell J, after referring to *Elliott & Anor v Pierson* [1948] 1 All ER 939, said (at p 444):

> It seems to me, not only from dicta of the learned judge but also on principle, that it necessarily follows that specific performance cannot be resisted by a vendor who, by his absolute ownership and control of a limited D company in which the property is vested, is in a position to cause the contract to be completed.

In *Elliott v Pierson*, an informal written and enforceable contract was made between the vendor and the purchaser for the sale, inter alia, of a freehold property. The property was vested in a company which was absolutely E controlled by the vendor by virtue of his shareholding and sole directorship. Later, the purchaser repudiated the contract after learning that the property was vested in the company, contending, inter alia, that the vendor could not enforce the contract as he had no title to the property. The vendor brought an action for specific performance. It was held that as the vendor F was in a position to compel the company to execute the necessary conveyance, he had a right to enforce performance of the contract and the purchaser never had a right to repudiate. In his judgment, Harman J said (at p 943):

> The law is that a vendor who has or can compel the assurance of all G necessary interests in the subject-matter of the sale may enforce the contract: see, for instance, the decision of Astbury J in *Re Hailes and Hutchinson's Contract* [1920] 1 Ch 233, where the cases are collected; and, having regard to Mr Elliott's position vis-a-vis the plaintiff company, I hold that he was always in that position notwithstanding the fact that there was no resolution in the minutes of the company nor any contract under the company's seal H agreeing to concur in the sale. It was objected that, as things stood, Mr Elliott had no interest in the freehold by virtue of which he could compel the concurrence of the company, but I do not feel the force of this. It seems to me to be enough that he was in a position, either by exercising his power as sole director or, if necessary, by winding-up the company, to procure it to act as he chose. I

A *Elliott*'s case was one of sole directorship in control of the company holding the land. In our case, as stated earlier, the uncontroverted evidence was that the subsidiary was wholly-owned by the holding company and that the directors of the subsidiary were the nominees of the holding company.

In appropriate cases, an injunction may be granted in aid of specific
B performance. Thus, it may be granted to restrain the disposal of the subject-matter of a contract by the defendant pending the disposal of a suit by the court. As stated in *Hadley v London Bank of Scotland Ltd* (1865) 46 ER 562 at pp 564–565:

> I have always understood the rule of the court to be that if there is a clear
C valid contract for sale, the court will not permit the vendor afterwards to transfer the legal estate to a third person, although such third person would be affected by lis pendens. I think this rule well founded in principle, for the property is in equity transferred to the purchaser by the contract, the vendor then becomes a trustee for him, and cannot be permitted to deal with the estate so as to inconvenience him. In a case, therefore, where there is a clear
D undisputed contract the court would in my opinion interfere.

See also *Preston v Luck* (1884) 27 Ch D 497 where Cotton LJ, referring to an application for an interlocutory injunction, said (at p 505):

> ...the object of which is to keep things in status quo, so that, if at the hearing the plaintiffs obtain a judgment in their favour, the defendants will have
E been prevented from dealing in the meantime with the property in such a way as to make that judgment ineffectual.

On the authorities cited above, it is clearly permissible in law to grant an interlocutory injunction restraining the actual controller and manager behind a company (as opposed to the company itself) from evading the
F contractual obligations or duties undertaken by the company. The fact that the company under control has not been restrained is, in itself, not a necessary bar from granting the relief against the controller and manager behind it. In the instant case under appeal, there was the letter of the holding company dated 13 April 1993 to the appellant enclosing the
G deposit and part payment and purporting to terminate the agreement. There was the uncontroverted evidence that the main assets of the subsidiary are the lands, and that the directors of the subsidiary were the nominees of holding company which wholly owned and was in complete control of the subsidiary. There was also a singular lack of evidence dispelling the not totally unwarranted fear of the plaintiff that the holding company, being in
H complete control of the subsidiary, might dispose of the landed property. In the light of all the above evidence and circumstances, and applying the principles in *American Cyanamid Co v Ethicon Ltd* [1975] AC 396, we are of the view that there existed serious questions to be tried and that the balance of convenience lies in favour of maintaining the status quo of the
I situation until the trial of the action.

For the above reasons, we had allowed the appeal, set aside the order of the learned trial judge dated 24 August 1993 and granted the interlocutory injunction as prayed subject to the usual undertaking to be given by the appellant as to damages. We had also ordered that costs here and below be taxed, if not agreed, and be paid by the holding company to the appellant and that the deposit for the appeal be refunded to the appellant.

Appeal allowed. Interlocutory injunction granted.

Reported by Jafisah Jaafar